

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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**DAWN SCOTT-IVERSON,**

Plaintiff,

vs.

**INDEPENDENT HEALTH  
ASSOCIATION, INC.,**

Defendant.

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**ATTORNEY AFFIDAVIT IN  
SUPPORT OF AWARD OF  
ATTORNEY'S FEES AND COSTS**

Civil Action No.: 13-CV-0451 V(F)

STATE OF NEW YORK                    )  
  : ss.  
COUNTY OF ERIE                    )

R. SCOTT DELUCA, ESQ., being duly sworn, deposes and says:

1. I am a counselor and attorney-at-law duly admitted to practice law in the State of New York and before this Court, and am a senior counsel at the law firm KAVINOKY COOK LLP, counsel for Defendant Independent Health Association, Inc. in this action.

2. I submit this affidavit in accordance with the Court's Decision and Order (*see Docket #118*, filed October 12, 2016) granting Defendant its reasonable expenses (including attorney's fees) incurred when Defendant successfully opposed Plaintiff's motion to compel discovery.

**PROCEDURAL BACKGROUND**

3. On April 1, 2016, Plaintiff filed a motion to compel discovery against Defendant, pursuant to FED. R. CIV. P. 37(a)(3)(A). *See Docket #88*, filed April 1, 2016 [herein "Plaintiff's Motion"].

4. Defendant duly opposed Plaintiff's Motion to compel in papers timely filed with this Court. *See* Docket #92, filed April 19, 2016.

5. In its response to Plaintiff's Motion, your Affiant (on behalf of Defendant) argued that Plaintiff's Motion should be denied because—*inter alia*—Plaintiff's counsel never served Plaintiff's discovery demands on your Affiant, Plaintiff failed to engage in any efforts to resolve the purported discovery dispute before filing a motion to compel, and Plaintiff did not actually identify any shortcomings in Defendant's discovery responses.

6. In addition to opposing Plaintiff's Motion, Defendant also requested an award of expenses (including Defendant's attorney's fees and costs) related to Defendant's opposition to Plaintiff's Motion, in accordance with FED. R. CIV. P. 37(5)(B).

7. Though Plaintiff was granted a deadline to file reply papers in support of her motion to compel (*see* Docket #89, filed April 4, 2016), Plaintiff did not file any such papers with the Court.

8. On May 4, 2016, the Court held oral argument with counsel for both parties concerning Plaintiff's Motion. *See* Docket #94, filed May 4, 2016.

9. By a Text Order issued after that oral argument (*see* Docket #95, filed May 4, 2016), the Court invited supplemental briefing and submission of authority concerning Plaintiff's Motion.

10. On May 18, 2016, on behalf of Defendant, your Affiant submitted a Memorandum of Law in further opposition to Plaintiff's Motion and clarifying the applicable authority. *See* Docket #98, filed May 18, 2016.

11. On May 23, 2016, Plaintiff's counsel filed an affirmation concerning Plaintiff's Motion. *See* Docket #101, filed May 23, 2016.

12. On June 23, 2016, this Court issued its Decision and Order regarding Plaintiff's Motion. See Docket #104, filed June 23, 2016.

13. In that Decision and Order, this Court largely adopted the arguments propounded by Defendant in opposition to Plaintiff's Motion, and denied Plaintiff's Motion. In essence, the Court denied Plaintiff's Motion finding that: (a) Plaintiff's discovery demands were never actually served on your Affiant and the relevant response periods did not accrue; (b) even if Plaintiff's counsel did serve Plaintiff's discovery demands on your Affiant, Defendant served its responses to Plaintiff's discovery demands on a date agreed-upon by Plaintiff's counsel and your Affiant (rendering Defendant's discovery responses timely); and (c) Plaintiff failed to comply with the requirement to engage in good faith negotiations to resolve a discovery dispute *before* filing a motion to comply. See Docket #104, filed June 23, 2016, p.11.

14. Given that Plaintiff's Motion was denied, the Court's Decision and Order also required that Plaintiff show cause why Defendant should not be awarded its reasonable expenses (including attorney's fees and costs) with regard to Defendant's opposition to Plaintiff's Motion. See Docket #104, filed June 23, 2016, p.12.

15. Plaintiff filed papers urging the Court to not grant an award of attorney's fees to Defendant due to the denial of Plaintiff's Motion. See Docket #106, filed July 6, 2016. On the other hand, your Affiant filed a declaration in support of an award of attorney's fees concerning Plaintiff's Motion. See Docket #108, filed July 18, 2016.

16. In a Decision and Order issued on October 12, 2016, the Court granted Defendant's request for expenses (including attorney's fees and costs) related to Plaintiff's Motion, pursuant to FED. R. CIV. P. 37(a)(5)(B). See Docket #118, filed Oct. 12, 2016.

17. In that Decision and Order, the Court directed that Defendant submit an accounting of its expenses and attorney's fees related to Plaintiff's Motion. See Docket #118, filed Oct. 12, 2016, p.12.

18. On behalf of Defendant and in conformity with this Court's Decision and Order (Docket #118, p.12), your Affiant now submits this affidavit in support of the Court's award of attorney's fees and costs, pursuant to FED. R. CIV. P. 37(a)(5)(B).

**FACTUAL CLAIMS IN SUPPORT OF SANCTIONS AWARD**

19. Attached hereto as Exhibit A is breakdown of all attorney's fees and costs incurred by Defendant in connection with Plaintiff's Motion. Exhibit A identifies the date of the work, a description of the work performed, the amount of time performing those tasks and the amount billed for such work.

20. All legal work reflected in Exhibit A was personally performed by your Affiant.

21. Kavinoky Cook follows a practice of maintaining daily time records for legal work performed by its attorneys; such time records reflect attorney time in units of 1/10 of an hour, along with a brief description of the legal services performed. Exhibit A was prepared based on contemporaneous time and billing entries prepared by your Affiant and entered into Kavinoky Cook LLP's electronic billing system.

22. None of the entries on Exhibit A are for legal work other than in relation to Plaintiff's Motion.

23. As detailed in Exhibit A, the legal work relating to Plaintiff's Motion included the following categories of tasks:

- a. your Affiant's review of Plaintiff's Motion, review of relevant authority regarding Plaintiff's Motion, and preparation, review and revision of Defendant's response to Plaintiff's Motion;
- b. preparation for oral argument concerning Plaintiff's Motion, and attendance at oral argument before Magistrate Judge Foschio regarding Plaintiff's Motion;
- c. review of relevant authority regarding Plaintiff's Motion and in response to the Court's invitation to submit supplemental briefing concerning said motion, as well as preparation, review and revision of Defendant's supplemental briefing relative to issues raised at oral argument;
- d. review of Court's decision to deny Plaintiff's Motion and the Court's order to show cause why Plaintiff should not be responsible for Defendant's reasonable expenses relative to Plaintiff's Motion;
- e. preparation, review and revision of Defendant's papers regarding Court's order to show cause why Plaintiff should not be responsible for Defendant's reasonable expenses concerning Plaintiff's Motion;
- f. review of Court's decision to grant Defendant's reasonable expenses (including attorney's fees and costs) concerning Plaintiff's Motion;
- g. preparation, review and revision of Defendant's application for reasonable expenses (including attorney's fees and costs) concerning Plaintiff's Motion; and
- h. regular communication with client representative concerning Plaintiff's Motion and Court's decisions regarding same.

24. These time entries are directly related to Defendant's opposition to Plaintiff's Motion and, therefore, Defendant is entitled to payment of said fees by Plaintiff as part of this Court's award of sanctions under FED. R. CIV. P. 37(a)(5)(B).

25. Your Affiant was the attorney solely responsible for drafting and preparation of the papers in response to Plaintiff's Motion, for appearing at the oral argument concerning Plaintiff's Motion, for providing this Court with supplemental briefing concerning Plaintiff's Motion (as requested by this Court), for responding to the Court's order to show cause, and for preparing Defendant's application for attorney's fees and costs.

26. In this regard, as shown on Exhibit A, your Affiant has spent a total of 41.45 hours performing legal work in connection with Plaintiff's Motion.

27. Your Affiant having carefully prepared contemporaneous time records concerning all legal work performed with regard to Plaintiff's Motion, Defendant urges this Court to grant the full amount sought in this motion without any reduction in said amounts.

28. With regard to two previous awards of sanctions against Plaintiff and/or Plaintiff's counsel in this case, this Court has already determined that your Affiant's billable rate (\$210 per hour) is appropriate and reasonable. *See* Docket #90, filed April 14, 2016, p.9; Docket #103, June 21, 2016, pp.1-2.

29. In accordance with the law of the case doctrine, this Court's previous conclusion that said billable rate is appropriate and reasonable must be followed.<sup>1</sup>

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<sup>1</sup> Nevertheless, your Affiant hereby incorporates the factual assertions set forth in a declaration previously submitted by your Affiant in support of the previous application for an award of attorney's fees. *See* Declaration of R. Scott DeLuca in Support of Request for Attorney's Fees and Costs (Docket #58, filed July 6, 2016), ¶¶14-18.

30. Based on an hourly billable rate of \$210 and a total of 41.45 hours of legal work concerning Plaintiff's Motion, Defendant is entitled to an award of attorney's fees in the amount of \$8,704.50.

31. Additionally, Defendant incurred expenses for online legal research (using Lexis Advance) performed relative to Plaintiff's Motion. It is Kavinoky Cook LLP's practice to bill clients for charges related to such online legal research. In this case, Defendant incurred charges of \$43.62 relative to online legal research performed concerning Plaintiff's Motion. Defendant should receive payment for this cost as well.

**WHEREFORE**, Defendant Independent Health Association, Inc. respectfully requests that this Honorable Court issue an Order awarding eight thousand seven hundred four dollars and fifty cents (\$8,704.50) in attorney's fees and awarding forty-three dollars and sixty-two cents (\$43.62) in online legal research expenses incurred by Defendant with regard to Plaintiff's Motion, for a total award of attorney's fees and costs of eight thousand seven hundred forty-eight dollars and twelve cents (\$8,748.12), and such other and further relief as this Court determines to be just and appropriate.

/s/ R. Scott DeLuca  
R. Scott DeLuca, Esq.

Subscribed and sworn to before me this  
11<sup>th</sup> day of November, 2016.

/s/ Erin L. Flynn  
*Notary Public*

Erin L. Flynn  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires January 23, 2020

# **Exhibit A**

<b>Date</b>	<b>Description of Legal Work Performed</b>	<b>Amount of Time Billed<sup>2</sup></b>	<b>Amount Billed to Client</b>
4/04/16	Review motion to compel filed by Plaintiff regarding Defendant's discovery responses; prepare e-mail to L. Carra regarding said motion.	1.3	273.00
4/07/16	Review Plaintiff's motion to compel discovery.	0.7	147.00
4/08/16	Review Plaintiff's motion to compel discovery; telephone conference with L. Carra relative to Plaintiff's motion and response to same.	1.1	231.00
4/10/16	Review relevant authority regarding Plaintiff's motion to compel and failure to engage in good faith effort to resolve discovery dispute; begin preparation of response to Plaintiff's motion.	1.1	231.00
4/17/16	Prepare, review and revise attorney declaration in response to Plaintiff's motion to compel discovery.	1.2	252.00
4/18/16	Further preparation, review and revision of attorney declaration in opposition to Plaintiff's motion to compel; review relevant authority and file documents regarding same; telephone conference with L. Carra regarding Plaintiff's motion and client's response to same.	2.3	483.00
4/19/16	Complete review and revision of Defendant's response to Plaintiff's motion to compel; review relevant authority regarding same; attend to e-filing of Defendant's response to Plaintiff's motion to compel.	1.4	294.00
5/04/16	Review relevant file document and authority in preparation for oral argument of Plaintiff's motion to compel; attend oral argument before Magistrate Judge Foschio regarding Plaintiff's motion; telephone conference with L. Carra regarding same; prepare e-mails to L. Carra regarding Plaintiff's motion to compel and the Court's invitation to submit additional briefing regarding said motion.	3.1	651.00
5/06/16	Telephone conference with L. Carra regarding Court's invitation to submit additional briefing regarding Plaintiff's motion to compel.	0.3	63.00

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<sup>2</sup> 0.10 is equal to six minutes of billable legal work.

<b>Date</b>	<b>Description of Legal Work Performed</b>	<b>Amount of Time Billed<sup>2</sup></b>	<b>Amount Billed to Client</b>
5/06/16	Review relevant authority regarding Plaintiff's motion to compel and additional points of law to be raised in supplemental briefing to be submitted at the Court's request.	1.1	231.00
5/16/16	Review relevant authority regarding Plaintiff's motion to compel in response to Court's invitation to submit authority regarding said matter.	1.2	252.00
5/17/16	Review relevant authority regarding supplemental submission concerning Plaintiff's motion to compel.	1.9	399.00
5/17/16	Extensive preparation of Defendant's memorandum of law with additional authority regarding Plaintiff's motion to compel.	3.2	672.00
5/18/16	Complete preparation and revision of memorandum of law submitting supplemental authority concerning Plaintiff's motion to compel; review additional authority regarding supplemental briefing; telephone conference with L. Carra regarding same; attend to e-filing of supplemental memorandum of law to Court.	4.8	1,008.00
5/19/16	Exchange e-mails to L. Carra regarding Plaintiff's motion to compel and Plaintiff's request for extension of filing deadline; prepare attorney affidavit in opposition to Plaintiff's request; exchange e-mails with L. Carra regarding Court's order granting Plaintiff's request.	0.5	105.00
5/24/16	Review Plaintiff's submission of authority concerning Plaintiff's motion to compel; prepare e-mail to L. Carra regarding same.	0.3	63.00
6/23/16	Review Court's order regarding Plaintiff's motion to compel.	0.5	105.00
6/27/16	Review Magistrate Judge Foschio's Decision and Order denying Plaintiff's motion to compel and ordering Plaintiff to show cause why reasonable expenses (including attorney's fees and costs) should not be issued concerning Plaintiff's motion; prepare e-mail to L. Carra regarding same.	0.6	126.00

<b>Date</b>	<b>Description of Legal Work Performed</b>	<b>Amount of Time Billed<sup>2</sup></b>	<b>Amount Billed to Client</b>
7/06/16	Review Plaintiff's new motion to compel discovery responses and Plaintiff's response to Court's order to show cause why sanctions should not be granted regarding Plaintiff's motion to compel.	0.25	52.50
7/07/16	Review Plaintiff's response to Court's order to show cause why sanctions should not be issued and Plaintiff's new motion to compel discovery; prepare e-mail to L. Carra regarding same; begin preparation of affidavit supporting an award of sanctions.	1.3	273.00
7/08/16	Review Court order dismissing Plaintiff's second motion to compel and order to show cause concerning sanctions relative to Plaintiff's original motion to compel discovery.	0.8	168.00
7/13/16	Review Court order dismissing Plaintiff's second motion to compel; prepare e-mail to L. Carra regarding same.	0.2	42.00
7/16/16	Review relevant authority and file documents relative to Court's order to show cause regarding award of Defendant's attorney's fees and costs concerning Plaintiff's motion to compel; preparation of attorney affidavit in support of award of expenses related to Plaintiff's motion to compel.	0.8	168.00
7/18/16	Prepare, review and revise affidavit relative to Court's order to show cause why sanctions should not be issued against Plaintiff or Plaintiff's counsel; review relevant authority regarding same; telephone conference with L. Carra relative to same.	4.8	1,008.00
10/12/16	Review Court's decision granting Defendant's application for attorney's fees and cost related to Plaintiff's failed motion to compel discovery; exchange e-mails with client regarding said matter.	1.2	252.00
11/9/2016	Preparation of attorney affidavit in support of application for attorney's fees related to Plaintiff's unsuccessful motion to compel discovery; review of billing records to be submitted to Court as part of fee application.	3.2	672.00

<b>Date</b>	<b>Description of Legal Work Performed</b>	<b>Amount of Time Billed<sup>2</sup></b>	<b>Amount Billed to Client</b>
11/11/2016	Complete preparation, review and revision of attorney affidavit in support of Defendant's application for expenses (including attorney's fees and costs) related to Plaintiff's denied motion to compel discovery; attend to electronic filing of said attorney affidavit/application with the Court.	2.3	483.00
<b>TOTAL for ATTORNEY'S FEES</b>		<b>41.45</b>	<b>\$8,704.50</b>

**EXPENSES INCURRED BY DEFENDANT**

4/30/16	Lexis Charges for online legal research performed with regard to Plaintiff's motion to compel discovery.		33.43
5/21/16	Lexis Charges for online legal research performed with regard to supplemental briefing submitted to Court regarding Plaintiff's motion to compel.		10.19
<b>TOTAL for EXPENSES</b>			<b>\$43.62</b>
<b>GRAND TOTAL REQUESTED</b>			<b>\$8,748.12</b>

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